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IN THE

Supreme Court of the United States

GROSSHANDELS-UND LAGEREI-BERUFSGENOSSENSCHAFT, BERUFSGENOSSENSCHAFT DER CHEMISCHEN INDUSTRIE, BUNDESVERSICHERUNGSANSTALT FüR ANGESTELLTE, and VERWALTUNGSBERUFSGENOSSENSCHAFT,

Petitioners,

v.

WORLD TRADE CENTER PROPERTIES, LLC, UNITED AIRLINES, INC., AMR CORP., AMERICAN AIRLINES, INC., also known as American Eagle, GLOBE AVIATION SERVICES, INC., HUNTLEIGH USA CORPORATION, BOEING COMPANY, ARGENBRIGHT SECURITY INC., BURNS INTERNATIONAL SECURITY SERVICES CORP., BURNS INTERNATIONAL SERVICES CORP., GLOBE AIRPORT SECURITY SERVICES, INC., UAL CORPORATION, and ICTS INTERNATIONAL NV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed the district court's dismissal of the negligence and wrongful death claims of four German Social Insurers ("Petitioners" or "GSIs") to recover monies they were required to pay under German law to the families of German nationals who were victims of the terrorist attacks of September 11, 2001. The GSIs are quasi-public entities charged with the responsibility of implementing Germany's social insurance laws, which require them to make automatic payments to families of German workers who are killed or injured, and then to seek to recover those payments from any responsible tortfeasors. Under German law, the standing of the GSIs to seek recovery for such payments arises at the time of injury or, at the very latest, at the time that the payments are made; and the legal rights of the victims and their families against any tortfeasor are automatically transferred to the GSIs. Nevertheless, the district court and Second Circuit found that the GSIs claims were barred by the legislation establishing the September 11 Victims Compensation Fund, and that the automatic transfer of claims under German law did not give the GSIs standing to maintain tort actions under New York or Pennsylvania laws.

Three questions are presented:

1. Under recognized principles governing conflict of law, should deference and comity be given to important provisions of German law, including the rights and obligations of GSIs who have made mandatory payments to German workers and/or their beneficiaries to pursue direct causes of action automatically assigned to them under German law?

2. Can important rights conferred to GSI under German law be negated by the purported "waiver" of such automatically assigned rights by the families of German victims before the September 11 Victims Compensation Fund?

3. Was it the intent of Congress in enacting the Air Transportation Safety and System Stabilization Act, Pub L. 107-42,115 Stat. 230 (September 22, 2001), as amended by the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001) (together "The Stabilization Act") to supersede Conflict of Laws principles and comity, and to deny the GSIs their legal remedies under German law?

LIST OF PARTIES

The parties are listed in the caption. In addition, The Federal Republic of Germany and The German Federation of Institutions for Statutory Accident Insurance and Prevention (The Hauptverband der Gewerblichen Berufsgenossenschaften or "HVBG") filed an Amicus Curiae brief with the Second Circuit in support of the Petitioners.

CORPORATE DISCLOSURE STATEMENT

The Petitioners are German corporations and no corporation holds an ownership interest in any of the Petitioners either as a parent corporation or as a public corporation holding 10% or more of a Petitioner's stock. Petitioners filed the district court action in their quasi-official capacity as instrumentalities of the Federal Republic of Germany charged with the responsibility of implementing the German Social Insurance laws.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Grosshandels-Und Lagerei-Berufsgenossenschaft v. World Trade Center Properties, LLC*, 435 F.3d 136 (2d Cir. 2006) (App. A). The Second Circuit affirmed the December 2, 2004 unpublished Summary Order signed by Judge Alvin K. Hellerstein, filed in *In Re September 11 Litigation* case no. 21 MC 97, doc. #631. *See* Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Second Circuit's opinion was rendered on January 11, 2006 (App. A).

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 40101 Title IV of the Air Transportation Safety and Systems Stabilization Act.

SEC. 402. Definitions

> **Collateral Source**.—The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

Sec. 405(c)(3)(B)(i) Limitation on civil action.—

(i) In general.—Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

Sec. 408(b) Federal Cause of Action.—

(1) Availability of action.—There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) Substantive law.—The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) Jurisdiction.—The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

STATEMENT OF THE CASE

The factual background of this case is not in dispute. Among the plane crash victims of the September 11 terrorist attacks were four German nationals (hereinafter the "German 9/11 Victims"). (A185-A188)[1] Pursuant to German social insurance law, which will be discussed *infra*, the Petitioners effected payments to the beneficiaries of these nationals. Subsequently, the beneficiaries sought and obtained awards of compensation from the Victims Compensation Fund ("VCF"). The German Social Insurers proceeded to commence the instant action against Respondents in order to be reimbursed for the collateral source payments they had made. The basis for Petitioners' claim is that they were assigned the victims' rights of direct action by operation of German law, and that these assignments were effected at the time that the loss occurred and were thus not rights that originated by way of subrogation or assignment by the victims themselves. Therefore, the right of direct action automatically assigned to Petitioners as a function of German law survived the later participation by beneficiaries of the German 9/11 victims in the VCF process, and Petitioners' right to direct action against tortfeasors could not have been "waived" by those beneficiaries since it was not their "right" to "waive."

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1. All references designated at (A.___) refers to the Appendix submitted by Petitioners to the Second Circuit.

REASONS FOR GRANTING THE PETITION

The issue of whether the German law should be applied to permit Petitioners to sue in the United States to recover for sums paid to German workers or their beneficiaries under a mandatory Social Insurance scheme is an important one. As the German Government and the German Federation of Institutions for Statutory Accident Insurance pointed out in their Amicus Curiae Brief filed in the Second Circuit, German Social Insurers insure approximately 42 million persons against the risk of work accidents in trade and industry, and increasingly in a global economy, mandatory payments made by GSIs relate to work accidents occurring outside of Germany. The German Social Insurance program covers not only German nationals but also foreign nationals — such as Americans — who are working in Germany for either German banks or other employers. Were an American employed in Germany to be killed while in the United States on a business trip, the Social Insurer would still be obligated under German law to pay benefits to the American widow and any orphans. Similarly, the German beneficiaries of the German workers killed on September 11th were paid benefits, and such benefits were required to be paid without regard to their citizenship or residence.

One of the central principles of the German Social Insurance program is that the GSIs have the right of direct action as of the time of the loss or, at the very least, the time of payment, against any responsible parties, including tortfeasors, for the injury or death of a worker covered by the law. The purpose of this provision is to maintain the financial integrity of the GSI system and to allow for recoupment of amounts paid in the event that it can be established that the injury or death was due to an intentional or negligent act.

For many years, the right of direct action under the GSI statutory scheme has been recognized outside Germany, particularly by the European Union, and both Germany and the other states comprising the European Union have expressed a keen interest in having their direct action laws applied extra-territorially when European workers are injured or killed while working outside the European Union. Without this right of direct action to pursue claims against tortfeasors outside of Germany and the European Union, the financial integrity of the German Social Insurance system would be undermined.

The Federal Republic of Germany considered this issue to be of such great importance that it directed its Federal Foreign Office, as represented in the United States by Ambassador Wolfgang Ischinger, via the German Embassy in Washington, D.C., to file the Amicus Curiae Brief in the Second Circuit and to assist the Petitioners by every available means to seek to this right of direct action, which is recognized in most other jurisdictions, also recognized in the United States, especially since many persons covered by the German Social Insurance system travel and work.

Given the importance of this right of direct action, any choice of law or conflict of laws analysis on this issue would lead inescapably to the conclusion that German law should apply. Significantly, German law does not provide that the right of direct action can be waived or otherwise abrogated, and most certainly not by the beneficiaries who have already received the automatic payments from the GSIs. If third parties (such as beneficiaries) were permitted to "waive" the GSIs' direct action rights, under Section 116 of the German Social Code 10th Book, a central financial pillar of the German Social Insurance system would be undermined since it would

undermine the GSIs' ability to replenish their financial resources by recovering the funds from tortfeasors wherever they can be found, either within Germany, other countries within the European Union, or elsewhere.

Accordingly, the Court should grant this writ in order to review the Second Circuit decision, which places United States law in conflict with the laws of not only Germany but also the laws of the European Union and every other country with a statutory scheme similar to that of Germany, including Italy, France, Austria and Luxembourg. The broader significance of the right of direct action is manifest in Article 93 of Regulation (EEC) No. 1408/71 of the European Council of 14 June 1971 [Official Journal L149, 05/07/1971 p.2] which mandates that the right of direct action must be recognized and acknowledged as a legal doctrine in European Union jurisprudence and, therefore, is binding on the 25 member states of the European Union.

Moreover, in addition to the European Union, the European Economic Area and Switzerland, Bosnia, Bulgaria, Croatia, Israel, Macedonia, Morocco, Tunisia, Turkey and Yugoslavia have also adopted and incorporated the principle of direct action reflected in German Social Law 116 SGB X, and unless reversed, the Second Circuit decision below will adversely impact the application of the direct right of action laws of those countries as well.

It is significant that all other relevant decisions relating to this right of direct action have unanimously affirmed the right of the GSIs to pursue rights of direct action to recover on behalf of injured or decedent workers covered by the German Social Insurance scheme. In *Caisse de Pension des Employes Prives v Kordel, et al*, C-397-96 (Sept. 21, 1999),

the European Court of Justice (ECJ) recognized the right of social insurers such as Petitioners under Article 93 of the relevant Regulation, and held that such rights were to be determined by the law of the state in which the social insurer originated. This ECJ decision is in accord with the German conflict of law rule applicable to "insurers pursuant to Article 33, paragraph 3 EGBGB of German law," which gives priority to the law of the jurisdiction which governs the relationship between the parties, *i.e.* the Social Insurers and the workers covered by the relevant statutes, which in this case is German Social Insurance law.

These German and European Union conflict of laws provisions are also in accord with Section 185 of the Restatement (Second) of Conflict of Laws, which provides that "the local law of the state under whose workman compensation statute an employee has received an award for an injury determines what interest the person who paid the award has . . ." To the extent that New York or Pennsylvania law would deprive Petitioners standing to pursue recovery of amounts paid under German law, the district court and the Second Circuit should have applied relevant Conflict of Laws principles and concluded that, given the paramount interest of German law and its important right of direct action, the federal district court should have found German law to be applicable to the issue of jurisdiction and standing to sue the Respondent tortfeasors in the one federal district court designated by The Stabilization Act to hear civil cases arising from the September 11th terrorist attacks, i.e., the United States District Court for the Southern District of New York.

I. REVIEW IS WARRANTED TO RESOLVE A QUESTION CONCERNING A CONFLICT OF LAWS

A. PETITIONERS OBTAINED RIGHTS OF DIRECT ACTION BY OPERATION OF GERMAN LAW, WHICH SHOULD BE CONTROLLING

The threshold conflict of laws issue presented here is not, as the Second Circuit opinion suggests, whether a particular state's law should govern the substantive standards applied to the negligence and wrongful death torts asserted by Petitioners, but whether Petitioners have a right to sue in federal court on the basis of direct claims assigned to them by operation of German law. Once it is determined that German law should apply on this standing issue, the second step of the analysis is to determine whether the VCF legislation abrogates the application of German law, which, as discussed below, it does not. Petitioners submit that their rights were not abrogated as a function of the Victims Compensation process.

1. The Second Circuit and the District Court Did Not Conduct A Conflict of Laws Analysis Involving German Law

The first step in any conflict of laws analysis is to determine "whether there is an actual conflict between the laws of the jurisdictions involved." *Maryland Casualty Company v. Continental Casualty Co.*, 332 F.3d 145, 151 (2d Cir. 2003); *Accord: Viva Vino Import Corp. v. Farnese Vini S.R.L.*, 2000 WL 1224903 *1 (E.D. Pa. 2000). The district court and the Second Circuit below did not reach

this issue, finding that the VCF scheme and state common law governed. Indeed, the district court erroneously concluded — *without any detailed analysis — that if it* applied German law, resulting in Petitioners' obtaining a favorable outcome, that this result would, in effect, undermine the VCF scheme. Since the VCF process has been concluded, it is difficult to understand how the recovery of relatively minor sums by German Social Insurers from the various tortfeasors would do any significant harm to the statutory scheme. On the other hand, the GSIs would be deprived of a legal remedy to recover payments that they were required to make under German "public" social insurance law, not by reason of private insurance contract. There is no legal basis for the Second Circuit's conclusion in this respect. Assuming that there is a conflict between American and German law, a conflict of laws analysis cannot be avoided, which takes into account the interests of the German Government's statutory scheme, in which the German parties play an important role, and the long-standing German social contract, which was entered into between the German Government and German industry over a hundred years ago, and which has persisted as an important German institution to the present day.

Second, the issue of Petitioners' standing to sue the negligent parties responsible, in part, for the September 11th disaster should have been resolved in accord with conflict of laws rules governing contractual relationships, not torts. This is because the right of direct action arose in the context of a social insurance scheme that is clearly contractual in nature, even if it is the function of a public social contract rather than a private one. Militating against the application of the doctrine of *lex loci delecti*, moreover, is that the German nationals in question were only fortuitously in the

United States, affording neither New York nor Pennsylvania a significant interest in the outcome of the case in regard to the determination of the issue of whether Petitioners have been afforded rights of direct action.

As prescribed by the Second Circuit in *Maryland Casualty Company*, *supra*, where the issue is what law should apply to the determination of contractual relationships, the analysis developed by the New York Court of Appeals in *Auten v. Auten*, 308 N.Y. 155, 160 (1954) should control. Described as the "center of gravity" or "grouping of contacts theory," the New York test applies the law of the place "which has the most significant contacts with the matter in dispute." *Id.* at 160. Relying on Restatement (Second) of Conflict of Laws, Section 188(2) (1971), the New York Court of Appeals identified five factors relevant to assessing which state has "the most significant relationship" to a contract dispute: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile or place of business of the contracting parties. *See also Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 317, 618 N.Y.S.2d 609 (1994).

Petitioners submit that Pennsylvania's conflicts of law rules are consistent with the New York approach. As explained in *Teledyne Technologies Incorporated v. Freedom Forge Incorporated*, 2002 WL 748898 (Pa. Comm. Pl., 2002), Pennsylvania has adopted a hybrid approach to analyzing conflict of laws, combining the "significant relationship test" (which is the test employed by the New York courts) with "governmental interest" analysis. As explained by the *Teledyne* court, "the state which has the most significant interest in settling the dispute and which is

the most concerned with its outcome is the state whose law should be applied." (*Id.* at p. *5) Significantly, however, the factors considered important to the *Teledyne* court in analyzing conflict of laws are, in fact, the same factors considered by the New York courts under their own analysis.

Analyzed in the light of the several factors considered important both by the courts of New York and Pennsylvania, the paramount interest Germany has in the instant matter cannot be ignored, especially since the relationship between the Petitioners and their insureds arose in Germany. The statutory framework governing the compensation afforded the victims by the German Social insurers is a function of German public policy and law. Germany was the place where the beneficiaries of the German 9/11 victims were compensated. Finally, as mentioned earlier, the German 9/11 victims were fortuitously present in the United States at the time of their deaths.[2] [3]

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2. It should be noted in this respect that the fact that these German nationals died in the United States was not contemplated specifically by the statutory social contract between them as German citizens and the Insurers, nor by the Victims Compensation scheme. It has been found in American law that the location of fortuitous occurrences does not require that local law be applied as a matter of conflicts if law. *See Dobelle v. National Railroad Passenger Corporation*, 628 F. Supp. 1518, 1529 (S.D.N.Y. 1986) in which the Court held that insofar as the accident in question occurred fortuitously in New Jersey, the latter forum had less of an interest than Pennsylvania in applying its punitive damages rule, citing the principal "that the locus of the accident has minimal interest when such a contact is merely fortuitous," referencing *Boy Scouts of America*, 65 N.Y.2d 189, 200, 491 N.Y.S.2d 90, 94-96 (1985).

3. Many if not most of the German victims were passengers on the hijacked airplanes that struck the World Trade Center.

This analysis is also consistent with Restatement (Second) of Conflict of Laws, Section 193 (1971), which provides that, generally, the rights created by an insurance contract "are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy." As explained by the Second Circuit in *Maryland Casualty Company*, *supra*, 332 F.3d at 153, where the risk contemplated by the parties to the insurance contract is diffuse and not centered principally on any one state, this factor has frequently and justifiably been discounted by the courts. *See, e.g., Olin Corp. v. Ins. Co. of N. Am.*, 743 F. Supp. 1044 (S.D.N.Y. 1990), *aff'd*, 929 F.2d 62 (2d Cir. 1001) (*per curiam*).

Where, as here, the obligation of the GSIs to compensate victims arose solely as a function of German statutory law, which did not contemplate a specific location of the insured risk, the fact that the German victims lost their lives in the U.S. should not, *a fortiori*, compel the application of U.S. law in regard to the Petitioners' rights of direct action. In addition, insofar as the vast majority of social insurance benefits afforded German nationals by public social insurers like Petitioners have been provided in connection with risks presenting themselves in Germany, the social contract, in fact, contemplated that the insured risk would be located in Germany.

Furthermore, when analyzed against the backdrop of conflict of laws factors articulated by Restatement (Second) of Conflict of Laws, Section 6 (1971), it is apparent that Germany has an overwhelming interest in having its laws concerning the rights of social insurance carriers applied. As explained under this section of the Restatement, where there is no statutory directive for a court to apply its state's

law, the factors relevant to the choice of the applicable rule of law include: (1) the needs of the inter-state and international system; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability and uniformity, as a result; and (7) ease in the determination and application of the law to be applied.

In light of the foregoing discussion regarding the importance of the choice of law issue to Germany and its social insurers, any conflicts of law analysis undertaken by an American court should, therefore, take into considerations the following facts:

- Protecting the integrity of the statutory framework that governs the social insurance scheme that afforded some degree of compensation to German 9/11 victims is a significant goal of the German State;

- The relationship between Petitioners and the German 9/11 victims and their families arose in Germany;

- Germany was the place where the beneficiaries of the German 9/11 victims were compensated by the German Social Insurers;

- The German 9/11 victims were fortuitously present in the United States at the time of their deaths, giving credence to the argument that Germany should logically be afforded substantial consideration in regards to vindicating the interests of persons covered under its national insurance scheme.

- The U.S. Courts must consider Germany's interest in having the conflict of laws analysis include consideration of the characteristics of the social contract that govern the insurance relationship between the German state, its citizens and others covered by German Social Insurance.

With regard to this latter point, the Second Circuit wholly discounted Petitioners' argument that the right of direct action implicated contracts based conflict of law analysis, holding to the contrary that the sole issue presented was one of how Pennsylvania and New York conflicts of laws principles applied to actions arising in tort. Petitioners strongly disagree with this holding on the basis that the legal relations between Germany and those covered under its system of Social Insurance should not be governed by the chance application of state tort law based on the occurrence of random events. Where, as here, Petitioners are not private insurance companies, but rather are public corporations charged with the responsibility of implementing the Federal Republic of Germany's social insurance program, a program which has persisted as an important German institution for over a hundred years, the overwhelming interest Germany has in affirming the direct rights of action of its public social insurers should not be so summarily disregarded without rigorous analysis.

In short, that the German statutory scheme implicates a very significant state interest in affording the GSIs the right to sue tortfeasors on the basis of direct actions, which have been assigned to them by operation of German municipal law.

II. REVIEW IS WARRANTED TO DETERMINE WHETHER THE SECOND CIRCUIT MISINTERPRETED THE INTENT OF CONGRESS

A. THE STABILIZATION ACT WAS NOT INTENDED TO SUPERSEDE CONFLICT OF LAW PRINCIPLES AND TO DENY PETITIONER THEIR LEGAL REMEDIES UNDER GERMAN LAW

Despite the paramount interest of Germany's social insurance scheme, it was the conclusion of the district court below, affirmed by the Second Circuit, that recognition of Petitioners' direct right of actions would be "invidious" to the VCF program. This finding was clearly in error. The suggestion that the German law should be disregarded merely because the German beneficiaries sought to avail themselves of the benefits of the VCF is equally without merit. Under the VCF scheme, any "collateral source payments," such as those received by the beneficiaries from the Petitioners here, were offset against and deducted from the VCF awards, so there was no possibility of double payments or any "windfall" to the claimants. Correspondingly, the German beneficiaries who had previously received payments from Petitioners and were seeking additional payments under the VCF scheme could not have "waived" the right of the Petitioners to bring direct action to recoup amounts already paid. Consequently, Petitioners' right to seek from tortfeasors recoupment of the amount paid to beneficiaries is not inconsistent with the goal of providing fair and expeditious compensation to victims under the Victims Compensation program.

B. TO THE EXTENT THAT CONFLICTS EXIST BETWEEN GERMAN LAW AND THE LAWS OF NEW YORK AND PENNSYLVANIA, OR THE STABILIZATION ACT ITSELF, GERMAN LAW SHOULD PREVAIL

In the final analysis, to the extent there is a conflict between German law and the laws of New York and Pennsylvania, or the Stabilization Act, deference must be given to the unique and overwhelming interest Germany has in affirming the rights of its insurers, who play a centrally important role in implementing German state policies. Because the Petitioners, as agents of the German state, have provided benefits to victims, Germany's interest in having its law applied to the assignment of rights is clearly more compelling than the interests of New York or Pennsylvania in applying their own law where the relationship between these two states and the victims was wholly fortuitous. As previously noted, although the direct actions asserted here may not have been contemplated by American law *per se*, the concept of a direct action does not violate any clear public policy even when one considers the Federal interests involved.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 11, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: November 9, 2005 Decided: January 11, 2006)

Docket Nos. 05-0182-cv(L), 05-0184-cv(CON).

GROSSHANDELS-UND LAGEREI-BERUFSGENOSSENSCHAFT, BERUFSGENOSSENSCHAFT DER CHEMISCHEN INDUSTRIE, BUNDESVERSICHERUNGSANSTALT FÜR ANGESTELLTE, AND VERWALTUNGSBERUFSGENOSSENSCHAFT,

Plaintiffs-Appellants,

–v.–

WORLD TRADE CENTER PROPERTIES, LLC, UNITED AIRLINES, INC., AMR CORP., AMERICAN AIRLINES, INC., ALSO KNOWN AS AMERICAN EAGLE, GLOBE AVIATION SERVICES, INC., HUNTLEIGH USA CORPORATION, BOEING COMPANY, ARGENBRIGHT SECURITY INC., BURNS INTERNATIONAL SECURITY SERVICES CORP., BURNS INTERNATIONAL SERVICES CORP., GLOBE AIRPORT SECUIRTY SERVICES, INC., UAL CORPORATION, AND ICTS INTERNATIONAL NV,

Defendants-Appellees.

Appendix A

Before: CALABRESI, B.D PARKER, AND WESLEY, *Circuit Judges.*

WESLEY, Circuit Judge.

This case presents an unusual question: whether plaintiffs, German Social Insurers ("GSIs"),[1] may bring state-law based negligence and wrongful death claims arising out of the terrorist attacks of September 11, 2001, ("9/11") under authority of German law despite the personal representatives' receipt of funds from the 9/11 Victim Compensation Fund ("VCF" or the "Fund"). The district court answered that question in the negative, and we affirm.

On 9/11, six individuals insured by the GSIs—Christian Adams, Klaus Bothe, Sebastian Gorki, Heinrich-Richard Kimmig, Wolfgang Peter Menzel, and Klaus Johannes Sprockamp—lost their lives as a result of the terrorist attacks. Some were passengers on the hijacked airplanes. Others were present at the World Trade Center ("WTC"). All but one of the decedents were killed at or near the WTC in New York. Adams died in Pennsylvania.[2] The personal representatives

1. German Social Insurers are government-backed entities that underwrite risks to employees of German companies in order to spread those risks among the general working population. Employers pay the premiums, and the GSIs pay claims upon injury to a given employee. Thus, unlike private life-insurance providers common to the American insurance landscape, GSIs are not profit motivated, and the insured employees are covered for broad categories of injuries, including but not limited to death.

2. Adams was aboard United Airlines Flight 93 from Newark to San Francisco, which crashed in a field in rural Pennsylvania after being hijacked.

of each decedent submitted a claim to the VCF and received compensation from the Fund. The GSIs paid insurance benefits to the decedents' beneficiaries.

Subsequently, the GSIs brought suit against defendants for wrongful death and negligence for the amounts paid by the GSIs to decedents' beneficiaries. The GSIs premise their right to sue upon a provision of German law that they assert automatically transfers the claims of the insureds—here the decedents—to the relevant GSI upon the insured's injury: "A claim for compensation for a loss . . . is transferred to the social insurance carrier . . . to the extent that the social insurance carrier . . . has to pay social benefits as a result of the occurrence of loss." *Sozialgesetzbuch* (German Social Insurance Code), Aug. 18, 1980, Part X, § 116 *Ansprüche gegen Schadenersatzpflichtige*, ¶ 1 (hereinafter "SGB X, § 116, ¶ 1"). The GSIs expressly disclaim that the putative right to bring this action is based upon subrogation.

Given the automatic transfer, the GSIs claim that the waiver of the right to bring any civil action arising out of the 9/11 attacks by the decedents' personal representatives—a necessary precursor to the receipt of funds from the VCF—could not have affected their rights to bring this action, as the personal representatives essentially had nothing to waive. Alternatively, the GSIs claim that, insofar as VCF claimants may recover collateral source[3] obligations, collateral source

3. Section 402(4) of the Air Transportation System & Stabilization Act defines "collateral source" to mean "all collateral sources [of compensation], including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." Pub.L. No. 107-42, 115 Stat. 230, 237 (Sept. 22, 2001).

providers should be able to maintain actions against tortfeasors for amounts paid. In relevant part, defendants assert that, even if any claims were transferred to the GSIs, the claims fail because the GSIs cannot maintain the negligence or wrongful death actions under New York or Pennsylvania law.

The Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001), as amended by the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001) (together, the "Stabilization Act"), provides the starting point for our analysis. *See generally Virgilio v. City of New York,* 407 F.3d 105 (2d Cir.2005) (discussing statutory framework). Title IV of the Stabilization Act establishes the VCF and the rules governing claims related to the 9/11 attacks. Relevant here, section 408(b) creates an exclusive federal cause of action "for damages arising out of the hijacking[s]" and dictates that "[t]he substantive law for decision in any such [action] shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law." 115 Stat. at 240-41. Thus, New York and Pennsylvania law provide the rules to be applied.

Because there were two places of injury, we apply the choice-of-law rules of each of those states. New York's and Pennsylvania's tests require application of the wrongful death and survival statutes of those states. New York choice-of-law analysis for torts[4] depends upon whether the competing

4. We reject plaintiffs' contention that contract choice-of-law analysis applies, as the essence of their claim is one of tort. Accordingly, we rely on tort choice-of-law rules.

legal rules relate to conduct regulation or loss allocation. Given that wrongful death and survival actions relate to loss allocation, *see Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 198, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985), and that the parties are domiciled in a number of different states, the presumption is that New York's rules apply, *see Neumeier v. Kuehner,* 31 N.Y.2d 121, 128-29, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972); the GSIs have not persuaded us otherwise.

Pennsylvania choice-of-law analysis for torts incorporates government-interest analysis and the "significant relationship" theory. *See Cipolla v. Shaposka,* 439 Pa. 563, 267 A.2d 854, 855-57 (1970); *Leonard v. Reed* 62 Pa. D. & C.4th 166, 172 (Pa.Com.Pl.2003); *see also* Restatement (Second) of Conflict of Laws § 145 (1971). In applying that qualitative test, we look to the following:

> (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered.

Leonard, 62 Pa. D. & C.4th at 172. The third and fourth factors are not particularly useful in this case. Defendants have several different principal places of business, and plaintiffs conduct their business predominantly in Germany and the European Union. We doubt there is a place where the relationship between the parties is centered. The second factor implicates New Jersey because the alleged omissions

and errors giving rise to the insurer's indirect injury would likely have taken place at Newark Airport, the place of departure for decedent Adams' plane. But none of the parties has suggested that New Jersey law applies.[5] Finally, the first factor favors application of Pennsylvania law because Adams' injury obviously occurred in Pennsylvania.

Despite the interest that the GSIs have in compensating beneficiaries and, to a lesser extent, in reimbursement for that compensation, the additional consideration of consistency leads to the application of Pennsylvania law. Everyone aboard United Airlines Flight 93 perished. Although the victims' beneficiaries have received compensation from the VCF, the GSIs press their claims. Given the possible combinations of potential litigation flowing from that crash, it makes sense to apply one set of law to the claims involved. Accordingly, deference to uniformity weighs in favor of Pennsylvania law as opposed to German law. *See* Restatement (Second) of Conflict of Laws § 6.

Turning to the wrongful death claims, we find that the GSIs have no recourse against defendants. Even if New York or Pennsylvania courts would recognize a transfer of claim from the decedents to the GSIs pursuant to German law, the decedents had no wrongful death claim to transfer. At common law, a beneficiary had no right of action against tortfeasors for the pecuniary loss caused by the death of the decedent. *See, e.g., Hernandez v. New York City Health &*

5. This comes as no surprise; New Jersey law tracks the law of Pennsylvania on all relevant points. *See* N.J. Stat. Ann. §§ 2A:15-3, :31-2, :31-4 (2005).

Hosps. Corp., 78 N.Y.2d 687, 692-93, 578 N.Y.S.2d 510, 585 N.E.2d 822 (1991); *Hodge v. Loveland,* 456 Pa.Super. 188, 690 A.2d 243, 245 & n. 1 (1997). Nonetheless, New York and Pennsylvania both provide certain individuals with the right to recover for pecuniary loss caused by the wrongful acts of third parties. *See* N.Y. Est. Powers & Trusts Law § 5-4.1; Pa. R. Civ. P. 2202(a)-(b); 42 Pa. Cons. Stat. § 8301(b). These statutes, and case law interpreting them, provide that the cause of action is prosecuted by the estate's personal representative for the benefit of legislatively designated individuals: in New York, only distributees—those who would share in the estate if the decedent had died intestate—have a right to the proceeds from a wrongful death action, *see, e.g., Hernandez,* 78 N.Y.2d at 692, 578 N.Y.S.2d 510, 585 N.E.2d 822; in Pennsylvania, only the spouse, children, and parents of the deceased have an interest in the action, *see, e.g., Kiser v. Schulte,* 538 Pa. 219, 648 A.2d 1, 4 (1994). Decedents had no interest in a wrongful death claim. Wrongful death actions are for the benefit of those who would have enjoyed the care and support of the decedent but for the decedent's untimely and unfortunate death. The GSIs had no right to recover wrongful death damages.

Similarly, we find that the GSIs may not maintain their claim for negligence, which is nothing more than a survival action, given that they are not personal representatives and do not have the putative powers possessed by those carrying letters testamentary to prosecute such actions.[6] *See* N.Y. Est.

6. Defendants, noting that the GSIs have foresworn subrogation claims, argue that the survival claims must be dismissed because defendants owed no duty to the GSIs. Given our analysis, we need not reach that argument.

Powers & Trusts Law § 11-3.2; 20 Pa. Cons. Stat. §§ 3372-73; *Gee v. CBS, Inc.*, 471 F.Supp. 600, 615-16 (E.D.Pa.1979) (interpreting Pennsylvania law). "A personal representative who has received letters of administration of the estate of a decedent is the only party who is authorized to bring a survival action for personal injuries sustained by the decedent . . . on account of his or her death." *Mingone v. State,* 100 A.D.2d 897, 899, 474 N.Y.S.2d 557 (1984) (dismissing action without prejudice where no administrator had been duly appointed); *accord Kiser,* 648 A.2d at 4 ("A survival action . . . is brought by the administrator of the decedent's estate in order to recover the loss to the estate . . . resulting from the tort.").[7] Notwithstanding plaintiffs' assertion of a "direct"

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7. Citing *Bodner v. Banque Paribas,* 114 F.Supp.2d 117 (E.D.N.Y.2000), plaintiffs contend that they may sue even though they are not the personal representatives of the deceased. That case, however, is distinguishable. There, the intestate distributees asserted a federal cause of action. *See id.* at 126. As to those decedents that passed away in concentration camps in Europe, the district court relied on French succession law without undertaking a conflict-of-law analysis. The court found that the statutory distributees whose parents had died in New York State did not lack standing to sue under the Alien Tort Claims Act, pursuant to federal question jurisdiction, as they had a vested interest in the decedents' net estate upon their death. *Id.* at 121, 126-27.

Here, we are not faced with the situation where a distributee attempts, in extenuating circumstances, to press what might be styled a survival action under the rubric of a permissible federal cause of action. We are faced with insurance companies that collected mandatory premiums to cover risks and now assert that they fit within state statutory schemes that provide limited exceptions to the common law rule that tort actions do not survive a decedent's death. Given these circumstances, we are not inclined to void by judicial fiat the legislative choices of New York and Pennsylvania.

cause of action, their negligence claims are premised upon survival claims they cannot assert. Accordingly, dismissal of the negligence action was appropriate.

Plaintiffs' alternative collateral source argument is also without merit. While it is clear that Fund claimants do not waive the right to sue collateral source obligors, like the GSIs, *see* Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 239-40; *Virgilio*, 407 F.3d at 109, the claim that collateral source obligors therefore have the right to sue third-party tortfeasors does not follow. The statutory scheme of the VCF indicates that the limited waiver provision merely took account of the fact that Fund claimants had recoveries reduced by the amount of collateral-source reimbursements to which they were entitled. Since VCF awards were reduced by the amount of the collateral sources, claimants could still seek recovery for those funds from obligors. Stabilization Act §§ 405(b)(6), (c)(3)(B)(i), 115 Stat. at 239-40. The VCF thus stands as a source of compensation for victims and their families that chose to file claims while providing finality of liability exposure to a wide array of potential litigation targets. This federal foresight did not mystically grant collateral source providers an end-run around the barriers of state-based policy decisions.

Conclusion

The district court's order entered December 16, 2004, dismissing the action is hereby AFFIRMED.

APPENDIX B — EXCERPTED TRANSCRIPT OF PROCEEDINGS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 1, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 97
02 Civ. 07328

December 1, 2004
4:00 p.m.

In Re.:

SEPTEMBER 11 LITIGATION.

Before: HON. ALVIN K. HELLERSTEIN, District Judge.

MR. KOOB: Your Honor, my name is Charles Koob of Simpson Thacher & Bartlett representing Argenbright Security in this matter, and we are basically on this motion representing all of the defendants who move to dismiss these two cases.

THE COURT: Basically, I think I can save some time. Let me hear the attorney on behalf of the German insurer.

MR. KOOB: That was easy.

THE COURT: Specifically, Mr. McCallion, you need to tell to me how you can get away from the Air Transportation Safety and System Stabilization Act Section

405(c)(3)(B), and (c)(2)(c), which reads, in defining who can be a claimant to the Victim Compensation Fund, the special master to determine who can be an eligible individual, and with regard to someone who is suing in the case of a decedent, the requirements of such a claim and then the provision in subsection (3)(b) that the submission of a claim to the special master constitutes a waiver of the right to file a civil action.

MR. McCALLION: I will certainly try, your Honor.

First on the issue relating to the submission of claims before the Victim Compensation Fund, the parties involved, the individual family members of the decedent did submit claims, and to the extent they submitted a claim for the economic and non-economic damages suffered by the victim, those claims were reimbursed and an award was made.

However, the scope of that award was strictly limited and offset by any receipt from collateral sources specifically, and in the moving papers there is a section in the attachments relating to each award, that sets forth the amount of the award and then it deducts from that the amount which is denominated as a collateral source.

That collateral source, your Honor, are the, as far as we can determine, either 100 percent or close to 100 percent, were the payments which my clients, the social insurers had paid to the families, the beneficiaries of the decedent, pursuant to not contract but statutory provisions under a fairly complex German social insurance plan.

So I will argue two-fold: First of all, you can't waive what you don't got, and when the families submitted their claims to the Victim Compensation Fund they did not have the claim of the German the insurers strictly limited, and our claim is strictly limited to the amounts of payment that we were required to make by statute under German law, not all the claims for wrongful death, not all economic or non-economic damages.

When we filed the complaint in this case, we didn't say we are general subrogees and we are going to sue these defendants for all possible claims. We are simply seeking reimbursement for dollar amounts which we paid the families, which it's uncontested were not paid by the Victim compensation Fund.

Now, the families could not have waived — did not have that claim because we had the claim. The date of 9/11 when the planes carrying the —

THE COURT: The Victim Compensation Fund wasn't paying such claims.

MR. McCALLION: Exactly.

THE COURT: Nobody with life insurance was paid the amount of the insurance. That was a deduction universally.

MR. McCALLION: It was a collateral offset, so to the extent that it was a waiver of claims, the families did not have a claim, the very specific claim of the amounts which had been paid by statute for the German insurers.

Appendix B

Under German law, just to back up, certainly there are some areas of conflict, but by and large the choice of law issue attempts to — the statutes and case law tell us we should try and first of all identify and narrow the areas of conflict. Certainly, German law, we believe, should apply to the extent there is any conflict, but that area of conflict is fairly limited.

Under the German insurance law and the social mechanisms which are in place, the experts from both sides agree that as of the date of the accident, actually even before any payments were made, the German insurers had a claim, and basically had the right under German law to pursue the claims against the tort feasor relating to the injuries of the victim.

Now, it just so happens that the Victim Compensation Fund law and the congressional intent, as we know, is different than general U.S. law, and it did not pay or it offset any collateral payments from insurance proceeds.

Now, this does not create any inequity. In fact, it creates, perhaps coincidentally, an opportunity for this court to fairly easily reconcile what we believe are the choice of law requirements for choosing German law, German insurance companies having made these payments to reconcile with U.S. law.

Under American insurers, contractual arrangements premiums are paid by somebody, the individual decedent or his employer. That's quite different than the German insurance systems which is a state scheme. It's a German scheme which is —

THE COURT: Funded by taxes.

MR. McCALLION: — of paramount importance.

THE COURT: Funded by taxes, not by premiums.

MR. McCALLION: Correct. Actually the specific mechanism — generally you are right, yes, your Honor, I think we can assume that.

Now interestingly, the Victim Compensation Fund is funded by taxes as well, so at this point the tort feasors from the point of view of German nationals who got on a plane, they are covered by this German insurance system which 95 percent of the claims are paid out in Germany, but fortuitously and unfortunately for them, they were German nationals, citizens who for reasons which are now somewhat clear were on the planes that flew into the World Trade Center, and the German insurers had to pay because —

THE COURT: Your argument, if I were to grant your petition, would put the German insurers in a better position than any American insurer.

MR. McCALLION: well, there are two different types of entities but —

THE COURT: Yes, but wouldn't that be true? The American life insurer cannot recover either from the airline or from the World Trade Center or from any other non-active tort feasor.

MR. McCALLION: Yes, but it is a different entity.

The German insurers are an arm of the state for all intents and purposes. It is like Social Security.

THE COURT: But your argument would give them a better position than any American company would have.

MR. McCALLION: If that would be the ultimate effect, then — well, it's axiomatic —

THE COURT: I have so held, I have so held in my June 10, 2004 decision.

MR. McCALLION: Your Honor, in that, we believe that your Honor's choice of law analysis, and our experts are available for a hearing on it, would not do harm to or be inconsistent with your Honor's prior rulings to the extent that you ruled that when a Victim Compensation Fund award is made, that that covers all the claims of the party who is seeking a award from the victim compensation Fund.

THE COURT: You claim there is a direct right of action in the German insurer, and therefore, you are proceeding not on behalf of a decedent, as subsection (c) provides, but directly. The same thing would be true with respect a Louisiana insurer, and the question of policy that I put to you is whether it is right to allow a German insurer or a Louisiana insurer to be treated differently from a New York insurer.

MR. McCALLION: Your Honor, under classic choice of law analysis, all the restatement provisions under conflicts of law, the German conflicts of law provisions cited by both parties we believe militate in favor of the application and the recognition in this very one industry area which won't —

THE COURT: That is because you argue there should be a paramount respect for German law, but as a matter of conflicts of law, either interpreting the statute, which is federal and which is supreme, or using the law of the tort, which is New York, the choice would be either federal or New York, not German.

MR. McCALLION: If I may, your Honor, basically true, your Honor. However, once you get to New York law, the question is what New York law —

THE COURT: You want me to apply a grouping of contracts on the assumption this is a contract issue, but it is not a contract issue. Its an issue whether anyone can come before the Victim Compensation Fund, get paid by the United States Treasury, and still preserve a claim in the nature of a right of an insurer that is denied everyone else. There is nothing in New York law that allows that to happen as a matter of conflicts law, and there is nothing in federal law that allows that to happen.

MR. McCALLION: Your Honor, first of all, the German insurers weren't before the Fund, and we had many cases, and my colleagues had many cases before them. When we went before the Fund, the insurance proceeds were offset, so

there is no possibility of a double recovery here, and if I can just —

THE COURT: It's not an issue, double recovery. The issue is entitlement to proceed before the Victim Compensation Fund and obtain the significant benefits that most people, more than 90 percent of the people, chose to obtain.

This was a no-fault recovery, a very fast payment, a confidential procedure, and other benefits that Congress intended to be available to people who elected under the law to do this. The representatives of your decedents so elected and obtained a significant benefit. It is not a matter of double recovery because nobody having life insurance obtained recovery for the insurance. There was a deduction in all such cases. I don't see how German law can apply in this situation.

MR. McCALLION: Your Honor, although I didn't cite it specifically in the brief, it was cited in the original letter where I attempted to persuade Mr. Barry and others unsuccessfully to let our claim go forward, but, and just rereading it before the argument, the second circuit in Dobelle v. National Railroad, 572 F.2d 81, went through a similar analysis and found that properly New York law would apply, but that in determining the choice of law, New York follows giving the controlling effect to the law of jurisdiction because of the relationship of contract has greater concern with the specific issues raised in the litigation; and, your Honor, there aren't any earth-shattering implications if your Honor were to rule in favor of the German insurers here because we are talking about six individuals who happened to be on a plane.

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THE COURT: I disagree, because the distributive justice, the proposition of equality, is a significant goal. Everyone has to be treated alike. Everyone with life insurance has to be treated alike, regardless of whether the claimant is German or Dutch or English or Arab or Jew or a citizen of New York State or Louisiana, California, or anywhere else.

The people who terrorized us didn't choose according to race or religion or ethnic background. Congress provided a scheme of equality. Your argument is individous. I don't mean to say this disrespectfully, you are making a legitimate and proper argument as a lawyer for a client, but to make a distinction because of the adventitious issue that is presented, namely, that the German insurer has a direct right of action where many other insurance companies do not, presents a unlike situation.

It may be that under German law you have recourse to place a claim. I make no judgment with regard to that. It may be that the claimant had a fiduciary obligation under the policy that your client issued to consult with you and to make a reasoned decision whether to pursue remedies under normal litigation or to the Victim Compensation Fund.

But having chosen the Victim Compensation Fund, your client brought it into the jurisdiction of this court, and the special master, subject to all the developments that follow as well as the benefits, and one of the requirements is there is no recovery for insurers and no possibility of a proceeding brought by the insurer, whether directly on behalf of an insured or indirectly because the origin of your cause of action is the death of the insured. That's what gives rise to the direct action of the insurer.

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So for the reasons that informed my decision recorded in this pre-September 11 litigation, 21 MC 97, 2004 U.S. District Lexis 10595 decided June 10, 2004, and the reasoning under the statute, I decline to order it and it is dismissed.

MR. McCALLION: In view of your Honor's ruling, I will reserve all other arguments.

THE COURT: I don't mean to cut you short, but I have read your papers, and I have listened to your arguments and if there is something else you feel I should hear, I am willing to hear it.

MR. McCALLION: I just wanted to observe that while we think that a hearing might be more appropriate to have a full record from the experts, the experts on both sides were largely in agreement as to what the German insurance scheme was intended to do, and the only divergence was really as to the applicability, I will call it Section 40, the German law, which clearly shows that in the case that there is a direct right of action by the insurer, but the defense experts took the position that the law where the death or injury took place, the New York law should to the extent possible be read consistently with the standing of the German insurers.

THE COURT: But it's my interpretation that governs, not the interpretation of an expert. The proof of a foreign law may or may not be applicable under the conflicts analysis, does not determine the characterizations you have given in the conflict of law analysis.

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It is I interpreting federal law and New York law who must give the characterizations; it's I who must decide and subject to appeal of my rulings by the Court of Appeals, but to decide in the first instance, I have to decide to what extent if any federal law and New York law would incorporate provisions of German law.

Really, German law defines the rights between the insured and the representatives of the insured and the insurer; that's a matter of German law, but what is federal and determined by the Air Transportation Safety and Systems Stabilization Act is who is the claimant and who may appear before the Victim Compensation Fund, and what are the disabilities of appearing.

I have to make that decision. I have to make it reasoning from the statute and in a way that is applicable equally to everyone who comes before the Fund, and it is on that proposition that I make my ruling.

Secondarily, I have to look to New York law because that is the law that is required to be looked at by the statute, and also because I sit in New York City, and looking in New York law, the rule is that it is the jurisdiction with the most at stake that is to be applied, and that's either Pennsylvania in the case of your client, or New York; defending where that particular decedent was killed, what airplane he or she traveled in; and given the nature of the Victim Compensation Fund, given the rights and remedies that arise under the Fund, it is clear to me that the paramount considerations are in the forum and I interpret it. Germany defines the rights and liabilities as between the decedent and the insurer, the

decedent and the representatives of the decedent, but not as to the consequences of appearing before the victim compensation Fund.

MR. McCALLION: Your Honor, just two points for the record, if I could.

THE COURT: Go ahead.

MR. McCALLION: If I could just address very briefly. One is an issue that is somewhat mooted by your ruling, but there was an argument that the statute of limitations had expired with regard to one of the complaints that was filed, and I don't think we really got to it in our brief.

THE COURT: I am not going to rule on statute of limitations.

MR. McCALLION: But we are relying on a New York statute which extended by six months to two years.

THE COURT: I assume that your claim is viable.

MR. McCALLION: The second is the issue as whether an authorized representative of an estate with letters in their hand are the only ones who can bring a claim under New York law, and we believe that's not the case, and there is federal law to support it, that although the victims died here, to the extent they were domiciled elsewhere and citizens of another country, in this case Germany, that we would rely upon the Eastern District decision in Wagner v. Bank Pariba, 114 F.Supp. 2117, for the proposition that in such case of

foreign nationals, that letters are not necessary, and that by operation of statute, an interested party can bring an appropriate claim.

THE COURT: I make no ruling on what German law requires on that, and what in a normal instance an American court might do.

I look to the statute, the Air Transportation safety and System Stabilization Act and subsection (c) of Section 405 provides that it is the special master that makes the determination, and his determination is binding in fact without being subject to review. He made the determination by paying the claim, I by recognizing the claim, and that is part of my decision.

MR. McCALLION: Thank you, your Honor. We will rest on our papers.

THE COURT: Thank you, Mr. McCallion.

MR. KOOB: Thank you, your Honor.

THE COURT: I don't think that you will be too disappointed by not arguing.

MR. KOOB: I learned a long time ago, when you are ahead, sit down.

THE COURT: Silence is sometimes more eloquent. The next case is Pocasangre.

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MR. ELLIS: Jeffrey Ellis on behalf of United Airlines.

THE COURT: I don't think you need to argue. Pocasangre is represented by Robert T. Haefele. I'd like to hear from you.

MR. HAEFELE: Your Honor, in our papers to your Honor, we actually cited that we were willing to rest.

THE COURT: You are here for the record?

MR. HAEFELE: That is correct. Anything you want to ask —

THE COURT: I am not going to change the reasoning that informed my decision that I cited in the argument that just concluded, and I hold the same thing.

MR. HAEFELE: Thank you.

THE COURT: There will be a summary order that will be filed tomorrow.

MR. HAEFELE: Thank you, your Honor.

THE COURT: Anybody else have any business for me?

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APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 16, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 mc 97 (AKH)

IN RE SEPTEMBER 11 LITIGATION

02 **CIVIL** 7152 (AKH)

MARIA LUISA POCASANGRE, and ALFREDO POCASANGRE, Individually and as Personal Representative of the Estate of GLORIA DE BARERRA,

Plaintiffs,

-against-

UAL CORPORATION, et al.,

Defendants.

04 **CIVIL** 1382 (AKH)

VERWALTUNGSBERUFSGENOSSENSCHAFT,

Plaintiff,

-against-

WORLD TRADE CENTER PROPERTIES LLC, et al.,

Defendants.

Appendix C

03 **CIVIL** 7043 (AKH)

GROSSHANDELS-UND
LAGEREIBERUFSGENOSSENSCHAFT, et al.,

Plaintiff,

-against-

WORLD TRADE CENTER PROPERTIES LLC, et al.,

Defendants.

Whereas the Court having heard oral argument for summary judgment in the above cases, and the matter having come before the Honorable Alvin K. Hellerstein, United States District Judge, and the Court, on December 2, 2004, having rendered its Order granting the motion and directing the Clerk to enter judgment dismissing the lawsuits with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated December 2, 2004, the motion is granted and the lawsuits are dismissed with prejudice.

Dated: New York, New York
December 16, 2004

J. MICHAEL McMAHON
CLERK OF THE COURT

BY: s/ [illegible]
Deputy Clerk

(2)

No. 05-1315

JUN 14 2006

IN THE

Supreme Court of the United States

GROSSHANDELS-UND LAGEREIBERUFSGENOSSENSCHAFT, BERUFSGENOSSENSCHAFT DER CHEMISCHEN INDUSTRIE, BUNDESVERSICHERUNGSANSTALT FÜR ANGESTELLTE, and VERWALTUNGSBERUFSGENOSSENSCHAFT,

Petitioners,

v.

WORLD TRADE CENTER PROPERTIES, LLC, UNITED AIRLINES, INC., AMR CORP., AMERICAN AIRLINES, INC., also known as American Eagle, GLOBE AVIATION SERVICES, INC., HUNTLEIGH USA CORPORATION, BOEING COMPANY, ARGENBRIGHT SECURITY INC., BURNS INTERNATIONAL SECURITY SERVICES CORP., BURNS INTERNATIONAL SERVICES CORP., GLOBE AIRPORT SECURITY SERVICES, INC., UAL CORPORATION, and ICTS INTERNATIONAL NV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WORLD TRADE CENTER PROPERTIES LLC

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Counsel for Respondent World Trade Center Properties LLC

Of Counsel:
WOLFGANG A. DASE

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Should German law override the provisions and undermine the purposes of the Air Transportation Safety and System Stabilization Act protecting entities with a property interest in the World Trade Center from all lawsuits arising out of the death of a September 11th victim when the personal representative of that victim applied for and received an award from the Victim Compensation Fund?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent, World Trade Center Properties LLC, has no parent corporation and no publicly held company has an ownership interest of 10% or more in Respondent.

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ADDITIONAL STATUTORY PROVISION INVOLVED

49 U.S.C. § 40101, Title IV, Air Transportation Safety and System Stabilization Act.

Sec. 408 Limitation on Liability

(a) In General. —

(1) Liability Limited to Insurance Coverage.— Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity, arising from the terrorist-related aircraft crashes of September 11, 2001, against an air carrier, aircraft manufacturer, airport sponsor, or person with a property interest in the World Trade Center, on September 11, 2001, whether fee simple, leasehold or easement, direct or indirect, or their directors, officers, employees, or agents, shall not be in an amount greater than the limits of liability insurance coverage maintained by that air carrier, aircraft manufacturer, airport sponsor, or person.

COUNTER-STATEMENT OF THE CASE

Respondent World Trade Center Properties LLC ("WTCP") submits this Brief in opposition to the Petition of Grosshandels- und Lagereiberufsgenossenschaft, Berufsgenossenschaft der Chemischen Industrie, Bundesversicherungsanstalt für Angestellte, and Verwaltungsberufsgenossenschaft (together, "GSIs") for a writ of certiorari. Petitioners seek review of the Opinion of the United States Court of Appeals for the Second

Circuit (A. 1a-9a) affirming the Judgment of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, J.) (A. 10a.-25a) that granted Respondent's motion for summary judgment dismissing the GSIs' complaints.[1]

In July 2001, WTCP, through wholly-owned indirect subsidiaries, acquired the leasehold interests in four commercial buildings located at the World Trade Center. All of those buildings were destroyed in the terrorist-related aircraft crashes of September 11, 2001. WTCP's only connection to the events of September 11, 2001, and to the litigation brought by the GSIs, is its leasehold interests in the World Trade Center.

Petitioners are German Social Insurers, quasi-governmental entities insuring workers under German social welfare law. This case arises out of the deaths of six of Petitioners' insureds, German nationals who were killed in New York and Pennsylvania as a result of the September 11th attacks ("insureds" or "decedents"). The GSIs paid social insurance benefits to the family members of their insureds as required by German law (the "insurance payments"), then sued WTCP and others to recover those sums.

Shortly after September 11, 2001, Congress established the September 11th Victim Compensation Fund ("VCF" or "Fund"). Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001), as amended by the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001) (together,

1. References to "A. __" are to pages of the Appendix to the Petition for a writ of certiorari.

the "Stabilization Act").[2] Under that compensation system, victims of the September 11th attacks and their families were given a choice: They could either submit a claim to the VCF for the injury or death of a victim or they could pursue traditional litigation. Claimants could not pursue both options. When one submitted a claim to the VCF, he or she signed a form waiving the right to file a civil action (or be a party to an action) in any federal or state court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. *See* Stabilization Act § 405(c)(3)(B)(i).

The waiver of the right to file a civil action did not apply to collateral source obligations, such as insurance. Stabilization Act § 405(c)(3)(B)(i). Thus, in addition to receiving a VCF award, claimants were free to pursue insurance benefits resulting from a September 11th victim's death. In calculating the net amount of an award, the VCF reduced or offset the award by collateral source compensation that a claimant received or was entitled to receive, including insurance benefits. Stabilization Act § 405(b)(6). Such insurance benefits were offset without regard to whether they were paid by insurers located in the United States or abroad.

Prior to the commencement of the GSIs' lawsuits, each German insured's personal representative applied for, and later received, a compensation award from the VCF for that insured's death. The family members of the decedents also received insurance payments from the GSIs, for which the

2. The Stabilization Act was subsequently amended on January 23, 2002 (Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 114(a). 115 Stat. 2427, 2435 (2002)) and on November 25, 2002 (Homeland Security Act of 2002, Pub. L. No., 107-296, § 890, 116 Stat. 2135, 2251).

VCF made offsets from its awards. Nonetheless, the GSIs sued under Stabilization Act § 408(b)(1), asserting wrongful death and negligence claims based on the deaths of their insureds. The GSIs contended that German law authorized them to seek recovery of the insurance payments and that neither the Stabilization Act nor the VCF awards precluded their claims.[3]

The District Court dismissed the GSIs' lawsuits because the Petitioners' claims were inconsistent with the purposes of the Stabilization Act and the legal effect of the VCF awards.

The Court of Appeals affirmed the Judgment of the District Court, holding that, pursuant to Stabilization Act § 408(b)(2), the substantive law for decision governing the GSIs' claims was to be determined by the choice of law principles of the states in which the aircraft crashes occurred (New York and Pennsylvania). Applying traditional choice of law analyses, the Court of Appeals held that the GSIs were not authorized to bring their wrongful death and negligence claims under New York law or under Pennsylvania law. As it had done in previous decisions involving claims arising out of the September 11th terrorist attacks, the Court of Appeals also ruled that the GSIs were precluded from bringing their lawsuits because VCF awards resulted in "finality of liability exposure" for entities like Respondent and others protected by the Stabilization Act. A. 9a.

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3. Petitioners' interpretation of German law is incorrect because under German law, Petitioners were statutory subrogees and stood in the shoes of their insureds. Once the VCF issued its awards, Petitioners' subrogation rights were extinguished. Brief for Defendant-Appellee World Trade Center Properties LLC, United States Court of Appeals for the Second Circuit, June 10, 2005, at 17-25. In any event, German law does not apply. *See* III.2., *infra*.

REASONS FOR DENYING THE PETITION

The Petition should be denied because it does not meet this Court's standards for review.

I. The Court Of Appeals' Decision Does Not Conflict With Any Decisions Of This Court, With The Decision Of Another United States Court Of Appeals Or With A Decision Of A State Court Of Last Resort.

"A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1." *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991). Petitioners point to no conflict between the decision of the court below and any relevant decision of this Court or any other decision of a United States court of appeals or any decision of a state court of last resort, Sup. Ct. R. 10, and there is no such conflict.

II. The Court of Appeals Did Not Decide An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

The Court of Appeals decided a straightforward choice of law issue: What laws governed the GSIs' wrongful death and negligence claims? Choice of law issues such as this are routinely decided by the United States courts of appeals.

Petitioners refer to the "importance" of the GSIs' purported right of direct action under German law (Pet. at 5), claiming that the Court of Appeals' decision "places United States law in conflict with the laws . . . of Germany"

and other nations' laws (*id.* at 6), that Germany has a "paramount interest . . . in the instant matter" (*id.* at 11, 12), and that the court below should have applied a contract-based rather than a tort-based choice of law analysis (*id.* at 9, 14). After enumerating the factors they believe the Court of Appeals should have considered in its analysis (*id.* 13-14), Petitioners state that they "strongly disagree" with the Court of Appeals' choice of law analysis. *Id.* at 14. In sum, Petitioners are simply dissatisfied with the result below. Their dissatisfaction, however, is not a sufficient basis for granting their Petition. *Cf.* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Here, the Court of Appeals applied the choice of law principles set forth in Stabilization Act § 408(b)(2) and reached a result that happens not to be to Petitioners' liking.

While the Court of Appeals' choice of law analysis was routine, its decision relating to the effect of the payments by the VCF to the decedents' personal representatives involved an "unusual question" of law. A. 2a. That question is not likely to arise again. As Petitioners concede, "the VCF process has been concluded". Pet. at 9. Since the Fund has concluded its work and is closed, no further awards based on the deaths of September 11th victims will be made and no future litigation regarding the effect of such awards is likely. In addition, the statutes of limitations for wrongful death and negligence claims for the deaths of September 11th victims have expired. Finally, as Petitioners conceded in their Brief to the Court of Appeals, a decision in the GSIs' favor would not generate many new lawsuits by other social insurers:

> Germany's statutory scheme, moreover, is relatively unique, so that it is unlikely that a ruling in Appellants' favor would generate a material volume of lawsuits, if any, asserted by other social insurers on a worldwide basis.

GSIs' Brief and Special Appendix for Plaintiffs-Appellants, United States Court of Appeals for the Second Circuit, Apr. 15, 2005, at 19. Accordingly, the issue decided by the Court of Appeals is not of such importance as to warrant review by this Court.

III. The Decision Of The Court Of Appeals Is Correct On The Merits

1. In Enacting The Stabilization Act, Congress Intended To Protect Entities With A Property Interest In The World Trade Center From Lawsuits Arising Out Of The Terrorist Attacks Of September 11, 2001.

The November 19, 2001 statutory amendments expressly expanded the categories of persons and entities protected under the Stabilization Act to include those "with a property interest in the World Trade Center, on September 11, 2001, whether fee simple, leasehold or easement, direct or indirect. . . ." Stabilization Act § 408(a)(1). That limitation of liability, coupled with the establishment of the VCF, including the statutory waiver, was intended to protect those with a property interest in the World Trade Center from litigation arising out of the deaths or injuries of September 11th victims. As the Court of Appeals held, once a claim was submitted to the VCF, protected entities were to have "finality of liability exposure". A. 9a ("The VCF thus stands

as a source of compensation for victims and their families that chose to file claims while providing finality of liability exposure to a wide variety of potential litigation targets.") The Court of Appeals' decision in this case is consistent with its other decisions on claims arising out of the terrorist attacks and involving awards by the VCF. *E.g.*, *Virgilio v. City of New York*, 407 F.3d 105, 115 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006) (holding that Stabilization Act balanced interests of victims' families for compensation with protected entities' need for "complete legal peace"; submission of claim to VCF effected election of remedies precluding lawsuits for victims' deaths); Stabilization Act §§ 405(c)(3)(B)(i), 408(a)(1).

2. Under The Stabilization Act, Where German Law Conflicts With Federal Law, Federal Law Prevails.

The decision of the Court of Appeals is correct for the additional reason that under the unambiguous language of the Stabilization Act, German law cannot apply if it conflicts or is inconsistent with federal law.

Petitioners claim that, in the final analysis, to the extent that there is a conflict between German law and the laws of New York and Pennsylvania (the laws selected by the choice of law principles set forth in Stabilization Act § 408(b)(2)) or with the provisions or purposes of the Stabilization Act itself, deference should be given to Germany's purported paramount interest in having its direct action laws applied. Pet. at 16. However, Petitioners ignore the choice of law provision governing their purported federal cause of action:

> The substantive law for decision in any such suit shall be derived from the law, including the choice

> of law principles of the State in which the crash occurred *unless such law is inconsistent with or preempted by Federal law.*

Stabilization Act § 408(b)(2) (emphasis added).

Thus, to the extent that German law conflicts or is inconsistent with federal law, it is federal law, including the Stabilization Act, that prevails. German law cannot override the provisions and undermine the purposes of the Stabilization Act, which protect entities with a property interest in the World Trade Center from all lawsuits arising out of the death of a September 11th victim when the personal representative of that victim applied for and received an award from the VCF.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

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